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No. 15-577

In the Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, DIRECTOR, MISSOURI DEPARTMENT OF NATURAL RESOURCES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE STATES OF NEVADA, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, LOUISIANA, MICHIGAN, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, WEST VIRGINIA & WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern.

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INTEREST OF *AMICI CURIAE*

Nevada and other Amici States have a vital interest in protecting the constitutional rights of state residents, whatever their religious beliefs. Consistent with those obligations, the State of Nevada—acting through its Attorney General—is authorized by its citizens to commence, join, or participate in any suit necessary "to protect and secure the interest of the State." Nev. Rev. Stat. § 228.170.

Amici States' interest is particularly acute here. At least three States—Nevada, Colorado, and Missouri—are currently confronted with litigation that raises questions about the limits that the U.S. Constitution imposes on state constitutions' Blaine or No Aid provisions. *See, e.g.*, *Duncan v. Nevada*, No. A-15-723703-C (Nev. D. Ct., Clark Cnty., filed Aug. 27, 2015); *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, 351 P.3d 461 (Colo. 2015), *petitions for a writ of cert. filed*, Nos. 15-556, 15-557, 15-558; *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 778 F.3d 779 (8th Cir. 2015), *petition for a writ of cert. granted*, No. 15-577. State and lower federal courts are split on those limits, and States often find themselves as defendants on both sides of the question.

SUMMARY OF ARGUMENT

This Court, in giving substance to the Religion Clauses, has found more illumination in James Madison's 1784 *Memorial and Remonstrance*[1] than in any other historical document—an exhibition of thought so profound that it was "incorporated not only in the Federal Constitution but likewise in those of most of our States."[2] There Madison opposed Patrick Henry's bill to fund "teachers of Christianity." Not sailors, weavers, and carpenters, but preachers. The question for Madison was whether Virginia should provide a special benefit to churches and churches alone. Some 230 years later, this case asks the opposite question: can a State offer a benefit to everyone *but* churches?

Amici States believe that the severe interpretation of Missouri's No Aid provision—first imposed by the Missouri Department of Natural Resources and then upheld by the Eighth Circuit—countenances unconstitutional discrimination on the basis of religion. To reverse the panel below requires no revolution in Equal Protection or Free Exercise jurisprudence. It simply requires clarifying what the Eighth Circuit panel suspected: that *Locke v. Davey* does not mean

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[1] James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *reproduced as* app. II to *Walz v. Tax Comm'n*, 397 U.S. 664, 719 (1970) (Douglas, J., dissenting).

[2] *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 214 (1963). For recent cases citing Madison's *Memorial and Remonstrance*, *see Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 703 (2012); *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 141 (2011).

that simply asserting State "anti-establishment" interests can justify the exclusion of churches, as churches, from neutral, generally available programs.

Church status was the sole basis for Missouri's decision to declare Trinity Lutheran—specifically its preschool and daycare, or "Child Learning Center"—categorically ineligible to apply for the Scrap Tire Program's money. That status was unrelated to the program's purpose in trying to "mitigate" the disastrous "environmental impacts"[3] of the five million scrap tires annually produced by Missourians.[4] Scrap tire dumps burn in fires inextinguishable for months, seep toxic oils into ground water, and breed mosquitos that carry West Nile virus.[5] Nor was church status among the eligibility criteria for grantees, the chief ones being (1) location in Missouri and (2) not causing new environmental harm.[6] This is why program officials, until told, had no reason even to *know* that a "Child Learning Center" was in fact part of a church. Instead, the Department of Natural Resources, when it rejected Trinity Lutheran's application, said it

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[3] Pet. Cert. App. ("App") 86a-89a; Mo. Rev. Stat. § 260.273(6)(2); 10 CSR 80-9.030.

[4] *Scrap Tire and Illegal Dumping Unit—General Information* and video, Mo. Dep't Nat. Res., http://dnr.mo.gov/env/swmp/tires/tirelist.htm (last accessed Mar. 24, 2016).

[5] *Id.*

[6] App. 91a (10 CSR 80-9.030(3)); 154a (church's ranking).

appreciated the church's "candor" in admitting that its daycare-preschool was a church entity.[7]

But if the terms of the program itself were indifferent to church participation, the church was not: it lost a chance at $30,000 in aid. The result is that Missouri in effect refuses to protect children equally from injury because they play at a church. This reversal of Madison's conundrum—instead of a special, religion-only boon, we have a special, religion-only burden—was anticipated by the great Virginian. Madison wrote that Henry's teacher bill "violates equality" by granting to some "peculiar exemptions"—but he added that the very same violation would occur were others subjected to "peculiar burdens."[8]

ARGUMENT

I. *Locke* does not justify the exclusion of churches from the Scrap Tire Program.

Missouri argues that its No Aid provision demands the perpetual exclusion of Trinity Lutheran from eligibility to its Scrap Tire Program and that this No Aid provision serves Missouri's (1) non-endorsement and (2) anti-establishment interests.[9] The Eighth Circuit found that *Locke v. Davey* allowed this action by Missouri. That conclusion was error.

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[7] App. 152a-53a.

[8] Madison, *supra* note 1, at 722.

[9] Mo. Const. art. I, § 7; App. 152a-53a (denial letter).

The *Locke* Court took pains to write a narrow opinion. The "only interest at issue," the Court said, was Washington's interest in "not funding the religious training of clergy,"[10] an interest so rooted in history as to be practically in a class by itself. The Court permitted the exclusion of Joshua Davey from a benefit program because Davey sought a "devotional degree" that was "essentially religious."[11] *Locke*, emphatically, did not say that a State can exclude *all* religious people from *all* benefits programs.

In fact, this was the fear of the late Justice Scalia, who, in dissent, wrote that the opinion could be read to justify exclusion of religion from "public programs in virtually any context."[12] The Court reassured its readers that "[n]othing in our opinion suggests that the State may justify any interest that its 'philosophical preference' commands."[13] The Court simply had a State that had "chosen not to fund a distinct category of instruction." This Court now confronts a State that has chosen not to fund a distinct category of *citizen*.

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[10] *Locke v. Davey*, 540 U.S. 712, 722 n.5 (2004).

[11] 540 U.S. at 721, 725.

[12] *Id.* at 730 (Scalia, J., dissenting).

[13] *Id.* at 722 n.5.

II. The standard of review.

The Court has held that even where there is no "right" to a State benefit, the State "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests."[14] This Court has also held that a State cannot "impose special disabilities on the basis of ... religious status."[15] But this brief takes no position on the standard of review, because whether under strict scrutiny or rational basis review, Missouri has not shown *any* defensible interest in excluding the church from its Scrap Tire Program.

III. Missouri's government-speech interest does not satisfy the demands of the Equal Protection or Free Exercise Clauses.

Equal protection of the laws requires that a State treat similarly situated persons similarly unless there is a lawful reason to do otherwise.[16] This means that a classification in a statute cannot be "wholly unrelated" to the statute's objective.[17] Missouri claims that its Scrap Tire Program serves to convert old rubber into a safer environment for all Missourians, from those who live near dump sites to children who fall on softer

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[14] *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

[15] *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990).

[16] *Johnson v. Robison*, 415 U.S. 361, 374-75 (1974).

[17] *Id.*

surfaces.[18] So why is it *relevant* that an applicant for such a grant happens to be a church? Missouri says that giving its money is a "form of government speech" and that giving to a church in particular sends a message of "endorsement" of the church.[19]

This is like saying Missouri's authority to endorse George Washington and disparage Karl Marx means that it can bar all Marxists from eligibility to benefit programs, since even letting them apply would "send a message" that socialism is condoned. A State has ample authority, without going as far as Missouri wishes, to deny a group access to a program's subsidy because the State dislikes the group's message—if the *reason* for the denial is related to the program's "purpose."[20] Missouri can keep a secessionist off the stage at a school program designed to celebrate the Missouri constitution, if failure to exclude would defeat the program's purpose,[21] but the State cannot, without more, block the obnoxious man's kids from public school. Or a church can be made selectively ineligible for a program when its intended actions exceed the program's scope—as where, say, the church intends to

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[18] *Scrap Tire and Illegal Dumping Unit—General Information*, *supra* note 4.

[19] Br. Opp'n Pet. Writ Cert. 4-5.

[20] *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2330-31 (2013); *accord id.* at 2333 (Scalia, J., dissenting).

[21] *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2249 (2015).

lobby despite receiving a non-profit grant[22] or to use an abortion-neutral medical subsidy to advocate for abortion.[23] But without examination of the State's purpose, this Court wrote, there is a "legitimate concern" that the government-speech doctrine could be a "subterfuge for favoring certain private speakers over others based on viewpoint."[24]

Typically the government-speech doctrine protects a State against claims by citizens who feel that the State has, against their will, forced or impeded speech. Here, unconventionally, the State claims that *its* right of speech is threatened at the hands of citizens.[25] But if the Scrap Tire Program is to be likened to those cases where officials promote distinct messages— consumption of beef,[26] park-monument sentiments,[27] or license-plate text and images[28]—then this program's message seems to be that reducing scrap tire is a health-and-safety priority. How is this message altered when it is spread to a church, along with everyone else? It is irrelevant to the program's purpose, or its criteria for choosing

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[22] *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 544 (1983).

[23] *Rust v. Sullivan*, 500 U.S. 173, 194 (1991).

[24] *Pleasant Grove City v. Summum*, 555 U.S. 460, 473 (2009).

[25] Br. Opp'n Pet. Writ Cert. 5.

[26] *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005).

[27] *Summum*, 555 U.S. at 476.

[28] *Walker*, 135 S. Ct. at 2249.

awardees, that a participant is a labor union or a facility for the criminally insane. Or if Trinity Lutheran, by participating, *becomes* a conduit for the State's message, how does the church corrupt the message? Trinity Lutheran promised in its Scrap Tire Program application that it would host a playground re-opening ceremony to "publicize the benefits of using recycled materials, especially discarded used automobile tires, to improve our environment."[29] It observed, too, that the new playground would serve as an "excellent learning environment for teaching the children the advantages of recycling."[30]

Possessors of playgrounds of every sort, from private Montessori schools to town parks, all apply to the program for the same reason: to get money to help resurface their playgrounds. (Incidentally, Trinity Lutheran's playground isn't used only by church members; it opens to the public after school, at night, and on weekends.[31]) When the benefit sought has no relation to religion, withholding that benefit from churches alone seems arbitrary and unreasoning. Even the State's speech power is "limit[ed]" by constitutional provisions "outside of the Free Speech Clause."[32] This limit surely arises when a State wields its speech power to deny a church access to a program whose message is wholly unrelated to the church's faith status.

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[29] App. 122a.

[30] App. 123a.

[31] App. 133a.

[32] *Walker*, 135 S. Ct. at 2246.

IV. Missouri's anti-establishment interest does not satisfy the demands of the Equal Protection or Free Exercise Clauses.

1. If Missouri's interest in refusing to "endorse" Trinity Lutheran is insufficient, the next question is whether a general or undefined "anti-establishment" interest supports the department's action. Amici recognize that the desire to disentangle the institutions of organized religion from the institutions of organized power have deep roots in American history.[33] But *Locke* taught that the Court, even when faced with venerable interests, still examines the specific interest asserted and weighs it against the specific burden on the party claiming injury.[34] The decision in *Locke* evaluated the precise purposes behind Washington's desire not to underwrite clergy training[35] and the actual functioning of Washington's program, finding it significant, for instance, that the scholarship allowed for certain theology courses, just not the vocational major in question.[36] The question here is what anti-establishment interest Missouri has in excluding churches specifically from *this* Scrap Tire Program.

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[33] Philip Hamburger, *Separation of Church and State* 479-92 (2002).

[34] *Locke*, 540 U.S. at 717, 724, 725.

[35] *Id.* at 720 n.3.

[36] *Id.* at 717, 724.

First, the program in *Locke*, the Court said, went a "long way toward including religion in its benefits,"[37] which cannot be said for the categorical bar here. Second, the church is similarly situated to every other playground in Missouri. There is no use a church can make of this recycled synthetic, famed for its cushioning and resistance to moisture, that a city park doesn't. The tykes atop the reincarnated tire will use it to run and romp, not sermonize and solicit. Third, the church, by participating in the program, contributes to reduce the number of tires that clog landfills in equal degree with any other playground owner. In sum, the church's religious commitments seem no more relevant than those of hospital administrators providing medical services—which this Court, in *Bradfield v. Roberts*, found no bar to federal money a century ago.[38] The church simply asked for ground-up tires to help it protect playing kids from injury.

The only arguable connection between No Rubber and No Aid is that by improving church property, the church becomes more beneficial to members or more attractive to non-members, or defrays costs to free up cash for religious activity. The initial problem with this rationale is that it wouldn't do if a *federal* environmental agency were making the claim. Anti-establishment concern under the U.S. Constitution arises not from the "divertibility of aid" but because the aid in question has some "inherent religious

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[37] *Locke*, 540 U.S. at 724.

[38] *Bradfield v. Roberts*, 175 U.S. 291, 298 (1899).

significance."[39] So, for instance, geometry books equally useful in public and parochial schools can be lent to the latter, even though in a sense this lending "supports" those parochial schools.[40] In fact, in *Walz*, the Court specifically found no federal establishment problem when a church is treated the same as a "playground."[41] The Court has also said that an anti-establishment interest does not require "cutting off church schools" from things "indisputably marked off from the religious function," like "sidewalks,"[42] a civic feature not all that different from a playground.

Missouri may have the power to make the separation between churches and public money more absolute than the U.S. government does, but Missouri has not offered any reasonable rationale for its exclusion. Nothing in the Scrap Tire Program's purpose or administration evokes classic establishment dangers like social strife, entanglement, or favoritism.

On the other side, there *is* evidence of injury to Trinity Lutheran. The church's projected cost of the work—the cost the Scrap Tire Program would have reimbursed—was $30,580.[43] The price of adherence to

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[39] App. 132a-33a. *See also Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 747 (1976); *McCollum v. Bd. of Educ.*, 333 U.S. 203, 211 (1948).

[40] *Mitchell v. Helms*, 530 U.S. 793, 822-23 (2000).

[41] *Walz*, 397 U.S. at 667 n.1.

[42] *Everson v. Bd. of Educ.*, 330 U.S. 1, 17-18 (1947).

[43] App. 125a.

faith went up by this amount. It's high enough to raise the prospect of a choice between faith and money. Trinity Lutheran presumably could transfer the Child Learning Center to a non-religious nonprofit, who could then carry on, largely as before, the ecumenical work of letting about 90 kids (plus neighborhood friends) play in safety.[44] A law "penalizes" free exercise when it "condition[s] the availability of benefits" on disavowal of one's beliefs.[45] *Locke* found that Washington didn't require its future ministers to "choose" between "religious beliefs and receiving a government benefit."[46] But surely the pressure to choose grows in proportion to (1) the benefit's value and (2) the number of benefit programs on offer.

2. This Court anticipated the Free Exercise problem presented here when the plurality in *Mitchell v. Helms* wrote that "to require exclusion" of religious institutions from a generally available, neutral program would "raise serious questions under the Free Exercise Clause."[47] If the Establishment Clause forbids excessive favoring of religion, the Free Exercise Clause forbids excessive disfavoring of it.[48]

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[44] App. 131a; 133a.

[45] *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *see also McDaniel v. Paty*, 435 U.S. 618, 626 (1978); *Torcaso v. Watkins*, 367 U.S. 488 (1961).

[46] *Locke*, 540 U.S. at 713.

[47] 530 U.S. 793, 835 n.19 (2000).

[48] *Everson*, 330 U.S. at 18; *Walz*, 397 U.S. at 669.

The most instructive Free Exercise case is *McDaniel v. Paty*, which struck a Tennessee law that barred minsters from serving in the legislature.[49] Tennessee asserted a general anti-establishment interest against having the ordained wield raw political power. This interest had once been law in all 13 colonies. But the Court held that this disability, despite the sanction of history, did not relieve the State from "demonstrat[ing] that its views of the dangers of clergy participation in the political process have not lost whatever validity they may once have enjoyed."[50] The point was that *every* anti-establishment interest, even one of the "highest order," as Tennessee claimed, needs a factual basis.[51] Missouri has not articulated such an interest. The members of Trinity Lutheran, like the Tennessee ministers, can still *practice* their faith, but the wrong is in depriving them all of something beyond the mere right of being let alone. On the facts of this case, Tennessee's exclusion of the religious from office, and Missouri's exclusion of the religious from benefits, are constitutionally indistinguishable.

Free Exercise cases after *McDaniel* continued to demand that the State interest, even under rational-basis review, be set out in response to a plausible claim of infringement. In *Lukumi*, it was "protecting the

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[49] *McDaniel*, 435 U.S. at 621.

[50] *Id.* at 628-29; *id.* at 637 (Brennan, J., concurring).

[51] *Id.*

public health and preventing cruelty to animals."[52] In *Locke*, it was "not funding the religious training of clergy."[53] In *Johnson v. Robison*, it was "enhancing military service and aiding the readjustment of military personnel to civilian life."[54] A State, as *Locke* said, cannot simply point to its mere "philosophical preference."[55] Requiring an explanation of the State interest asks little of the State and does little to restrict a State's range of action. After all, a State remains free to "burden" religion—if the State interest is in attacking evils like drug use (*Smith*),[56] harm to children (*Prince*),[57] or unlicensed book sales (*Murdock*).[58] Likewise a State can "benefit" religion—if the State interest is in promoting goods like student safety (*Everson*),[59] better education (*Agostini*),[60] civic

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[52] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 538 (1993).

[53] *Locke*, 540 U.S. at 723.

[54] *Johnson*, 415 U.S. at 385.

[55] 540 U.S. at 722 n.5.

[56] *Smith*, 494 U.S. at 890.

[57] *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

[58] *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943).

[59] *Everson*, 330 U.S. at 16-17.

[60] *Agostini v. Felton*, 521 U.S. 203, 232 (1997).

beautification (*American Atheists*),[61] or even contributing to the "pluralism of American society" (*Walz*).[62] Trinity Lutheran's plea is to share in the assistance that Missouri offers to all other groups—for the reason that it, too, like these groups, promotes the State's environmental well-being.

V. The *Locke* confusion harms Amici States.

State courts have read *Locke* to say that State officials, operating within the play in the joints between the Establishment and Free Exercise Clauses, can exclude the religious, as a category, from government programs.[63] Amici here argue only that State anti-establishment interests must be justified by some reasoning that connects the unequal treatment of the religious to the purposes of the program. So long as *Locke* is understood to permit wholesale exclusions of the religious by reference to diffuse, general, or unarticulated anti-establishment interests, States will continue to end up on both sides of two sorts of difficult cases. In some, the State, seeking honestly to apply its No Aid provision, will treat religious organizations and individuals differently—and get sued for differentiating. In other cases, the State will pass a law that makes benefits, like money as part of a school-

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[61] *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 281 (6th Cir. 2009).

[62] *Walz*, 397 U.S. at 689.

[63] *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, 351 P.3d 461, 474 (Colo. 2015), *petitions for cert. filed*, Nos. 15-556 (U.S. Oct. 27, 2015), 15-557 (U.S. Oct. 28, 2015), *and* 15-558 (U.S. Oct. 28, 2015).

choice program, available to all, and get sued for *failing* to differentiate.

CONCLUSION

This case does not require the Court to adopt a rule that a State can never justify a categorical exclusion of a church from generally available, neutral benefit programs. It is enough that in *this* case church status was irrelevant to the program's purposes and that in *this* case Missouri offers no supportable basis for its actions. Under the Free Exercise and Equal Protection Clauses, the guiding principle is the same, and Madison, once again, seems to have put it best: the "exclusion" of the faithful, he said, "violate[s] a fundamental principle of liberty by punishing a religious profession with the privation of a civil right."[64]

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[64] *Observations on Jefferson's Draft of a Constitution for Virginia, [ca. 15 October] 1788*, Founders Online, Nat'l Archives, http://founders.archives.gov/documents/Madison/01-11-02-0216 (last accessed Mar. 29, 2016) (reproduction of *The Papers of James Madison*, vol. 11, 7 March 1788–1 March 1789, at 281-295, Charles F. Hobson & Robert A. Rutland, eds., 1977). He said the same when he proposed, as the language that later became the First Amendment, that the "civil rights of none shall be abridged on account of religious belief"). *Amendments to the Constitution, [8 June] 1789*, Founders Online, Nat'l Archives, http://founders.archives.gov/documents/Madison/01-12-02-0126 (last accessed Mar. 29, 2016) (reproduction of *The Papers of James Madison*, vol. 12, 2 March 1789–20 January 1790 and supplement 24 October 1775–24 January 1789, at 196-210, Charles F. Hobson & Robert A. Rutland, eds., 1979).

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